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UNITED STATES DISTRICT COURT  
CALIFORNIA NORTHERN DISTRICT (SAN JOSE)

11 VLADIMIR A. BALAREZO, individually and ) Case No. C 07 05243 JF (PVT)  
12 on behalf of others similarly situated )  
13 Plaintiff, ) DEFENDANTS' REPLY TO PLAINTIFF'S  
14 vs. ) OPPOSITION TO MOTION TO DISMISS  
15 NTH CONNECT TELECOM INC., and ) COMPLAINT, OR, IN THE ALTERNATIVE,  
STEVEN CHEN, ) FOR SUMMARY JUDGMENT  
16 Defendants. ) Date: February 22, 2008  
 ) Time: 9:00 a.m.  
 ) Courtroom: 3

18 Defendants Nth Connect Telecom Inc. and Steven Chen hereby reply to plaintiff Vladimir  
19 Balarezo's opposition to their Rule 12(b)(6) Motion to Dismiss, or, in the Alternative, Motion for  
20 Summary Judgment.

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## MEMORANDUM OF POINTS AND AUTHORITIES

## **I. INTRODUCTION.**

Defendants hereby reply to plaintiff's late-filed opposition to defendants' motion to dismiss, or in the alternative, motion for summary judgment. While normally some leniency may be appropriate as it relates to timely compliance, this case has been plagued by inappropriate conduct by plaintiff's counsel. Indeed, counsel refused to participate in the early meeting despite several written demands. Counsel does not even attempt to justify the late opposition in this case.

In his opposition, plaintiff Vladimir A. Balarezo raises three arguments why the motion should not be granted: (1) that the extrinsic payroll records and pay stubs which defendants have attached to their moving papers are allegedly “inauthentic,” (2) because the complaint did not refer to the extrinsic documents and plaintiff’s claim does not rest upon these documents for his relief, and (3) that the face of the complaint sets forth valid causes of action for wage and hour violations, thus this matter is not appropriate for resolution on a Rule 12(b)(6) motion.

14 All three of plaintiff’s arguments fail because the documents are critical and they demonstrate  
15 that every hour plaintiff worked was tracked, signed-off on by plaintiff himself, and every penny of  
16 overtime was paid. First, other than plaintiff’s counsel’s argument in his brief, he has not provided  
17 a basis to challenge the authenticity of the payroll records defendants have attached to the declaration  
18 of Linda Francis, submitted in support of the motion. Indeed, plaintiff’s declaration does not  
19 mention a word about these documents being false, nor has plaintiff’s counsel filed an objection to  
20 the records’ authenticity. Nowhere does plaintiff say “that’s not my signature” or “those are not my  
21 pay stubs.” Plaintiff’s position is spurious. Second, regardless of whether the complaint specifically  
22 mentions Balarezo’s payroll records, his “signed-off” timesheets and pay stubs are the backbone of  
23 the claim.

Finally, as noted in defendants' moving papers, this case is appropriate for resolution at this time, because all of the records show that Mr. Balarezo was at all times compensated in excess of minimum wage plus overtime for all hours worked. As such, he cannot state a cause of action for such wage and hour violations and this case should be dismissed in its entirety under Federal Rules

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1 of Civil Procedure, Rule 12(b)(6).<sup>1</sup> In the alternative, summary judgment pursuant to Federal Rules  
 2 of Civil Procedure, Rule 56(c) should be entered in favor of defendants.

3 **II. DEFENDANTS ARE ENTITLED TO RELIEF UNDER F.R.C.P. 12(b)(6).**

4 As set forth in the motion, plaintiff's "signed-off" timesheets (not disputed in Balazero's  
 5 declaration) show every hour Balazero worked and his corresponding checks indicated he was paid  
 6 overtime for every overtime hour. Nowhere does Balarezo himself dispute these decisive facts. This  
 7 motion should be granted because:

- 8       (1) Plaintiff has not properly put at issue the authenticity of the records that defendants  
             attach to their motion;
- 9       (2) The law is clear that defendants are entitled to rely upon documents extrinsic to the  
             complaint in support of their motion, when such documents are central to the claim;
- 10      (3) Given the extrinsic evidence, plaintiff has not properly stated a cause of action for  
             wage and hour violations; and
- 11      (4) Plaintiff's late opposition should be disregarded.

12     **A. Plaintiff Has Not Put the Authenticity of the Time Cards and Pay Stubs at Issue.**

13     Plaintiff's primary opposition to defendants' motion is the contention that the pay stubs and  
 14 time cards which defendants attached to their moving papers are somehow "inauthentic."  
 15 (Opposition, p. 1, lines 16-17.) However, nowhere in the opposition or the supporting declaration  
 16 of Vladimir Balarezo is any actual objection to the authenticity of the exhibits asserted. Rather, Mr.  
 17 Balarezo explicitly acknowledges filling out the time cards in his declaration. (Balarezo Declaration,  
 18 ¶ 10.) Furthermore, Mr. Balarezo *does not dispute that the signatures on the time cards are his.*

19     In order to object to evidence submitted in support of a motion, a party must properly put that  
 20 matter at issue, either through declarations or properly asserted objections. Here, plaintiff does  
 21 neither.

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 28 <sup>1</sup> Since this is a class action, it cannot proceed without the lead plaintiff, and this motion should be  
       granted and the case dismissed in its entirety.

1        It is incredibly disingenuous for plaintiff to dispute the authenticity of the precise records  
 2 upon which he will, by matter of necessity, be required to use to prove his case. There is no  
 3 legitimate dispute over the authenticity of the records attached by defendants, and as such, they may  
 4 be relied upon by the court to make its ruling on this motion.

5        Those records -- which plaintiff signed-off on -- show that his employer kept track of his  
 6 work hours every day that he worked, and based his wages and overtime payments thereon. (See,  
 7 e.g., Exhibit "B" to Francis Declaration.) Plaintiff's counsel's inadmissible speculation that, because  
 8 the time cards reflect that Mr. Balarezo worked a regular schedule, somehow that renders the time  
 9 cards "suspicious," is specious on its face. (Opposition, p. 6, fn. 3.) Whether or not the "signed-off"  
 10 timesheets show a regular work day and counsel's speculation about same does nothing to advance  
 11 the opposition.

12        Indeed, a closer examination of plaintiff's time cards actually belies plaintiff's argument in  
 13 any event. The time cards show that, while his starting times are consistent, his completion times  
 14 are not – for example, the time card for May 26, 2007 shows end times of 6:00, 6:30, 5:40, 6:00,  
 15 5:30, and 6:00. (Exhibit "B" to Francis Declaration.) Plaintiff *had* to arrive to work at a consistent  
 16 time, in order to get his assignments for the day, while he left work once he finished his work for that  
 17 day. His time cards are entirely consistent with this practice.

18        As for lunch breaks, they too varied day to day – for the week of May 26, 2007, for example,  
 19 Mr. Balarezo documented that he took his break variously from 1:30-2:00, 1:50-2:20, 1:45-2:15,  
 20 1:30-2:00, 1:50-2:20 and 2:00-2:30. (Exhibit "B" to Francis Declaration.) Why would they vary if  
 21 he never actually took breaks? Plaintiff's self-serving claim that he was too busy to take lunch  
 22 breaks, even though "he put down the 30-minute meal break on his daily time cards," is not  
 23 sufficient to state a claim for missed meal breaks. (Opposition, p. 6.)

24        In a similar case, *White v. Starbucks Corp.*, a plaintiff-employee had no evidence showing  
 25 that he was not authorized or permitted to take rest breaks and specifically testified that nobody told  
 26 him or instructed him not to take a rest period. (*White v. Starbucks Corp.* (N.D. Cal. 2007) 497  
 27 F.Supp.2d 1080, 1088-1089.) There, the Court found that the employee's mere suggestion that he  
 28 was coerced into foregoing breaks, without more, was insufficient to defeat summary judgment on

1 the employee's claim for unpaid rest breaks. (*Id.*) Here, plaintiff has not even gone so far as to say  
 2 he was "coerced" into foregoing breaks -- only that he was "too busy." Such is clearly insufficient  
 3 under law to state a claim for missed breaks -- especially where the documentary evidence  
 4 conclusively states otherwise.

5 For purposes of this motion, plaintiff has not properly asserted any objection -- nor provided  
 6 any testimony -- that the time cards and pay stubs are *inauthentic*. Via his declaration, he may have  
 7 intended to put at issue the content of those records, but their authenticity is unchallenged.

8       **B. The Law Is Clear that Defendants May Rely on Extrinsic Documents.**

9 Plaintiff also argues, incorrectly, that a defendant may not rely upon documents which are  
 10 extrinsic to the complaint in a Rule 12(b)(6) motion. As defendants noted in their moving papers,  
 11 case law is clear that, where extrinsic documents are *central* to the complaint, they may be relied  
 12 upon by the court in ruling on a 12(b)(6) motion. (*Branch v. Tunnell* (9<sup>th</sup> Cir. 1994) 14 F.3d 449, 454  
 13 (overruled on other grounds in *Gailbraith v. County of Santa Clara* (9<sup>th</sup> Cir. 2002) 307 F.3d 1119,  
 14 1127.) *Branch* continues to be cited by other cases for the proposition that:

15           In evaluating the context in which the statement appeared, we must  
 16 take into account 'all parts of the communication that are ordinarily  
 17 heard or read with it.' In doing so, we deviate from the general rule  
 18 that courts, when ruling on a motion to dismiss, must disregard facts  
 19 that are not alleged on the face of the complaint or contained in  
 20 documents attached to the complaint. Our approach is permissible  
 21 under the 'incorporation by reference' doctrine, which permits us to  
 22 take into account documents 'whose contents are alleged in a  
 23 complaint and whose authenticity no party questions, but which are  
 24 not physically attached to the [plaintiff's] pleading.'

25 (*Knievel v. ESPN* (9<sup>th</sup> Cir. 2005) 393 F.3d 1068, 1076 (citations omitted); *see also, In re Silicon*  
 26 *Graphics Inc. Sec. Litig.* (9th Cir. 2002) 183 F.3d 970, 986.)

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1       Even where a party does not specifically refer to a document in the complaint, but where the  
 2 document is central to the plaintiff's claim and the authenticity of the documents are not in question,  
 3 a Court may consider the extrinsic material as part of a Rule 12(b)(6) motion. (*Parrino v. FHP, Inc.*  
 4 (9<sup>th</sup> Cir. 1998) 146 F.3d 699, 706; *Global Network Communications, Inc. V. City of New York* (2<sup>nd</sup>  
 5 Cir. 2006) 458 F.3d 150, 156-157; *Bryant v. Avado Brands, Inc.* (11<sup>th</sup> Cir. 1999) 187 F.3d 1271,  
 6 1281.) This prevents a plaintiff from pleading around troublesome documents to avoid a Rule  
 7 12(b)(6) motion. While the line of cases cited above relate to the securities fraud area, they all deal  
 8 with situations where documents that were not referred to in the complaint nor attached were  
 9 nevertheless considered by the Court when deciding a motion to dismiss.

10      Plaintiff's contention that his time sheets and his pay stubs/earnings statements are not central  
 11 to his complaint is simply disingenuous. (Opposition, p. 6.) All of plaintiff's claims rest on the  
 12 allegation that he was not paid overtime and not provided with meal breaks at Nth Connect.  
 13 However, the undisputed evidence shows otherwise – i.e., that he was paid one and one-half times  
 14 his regular hourly wage for all overtime hours, and that he was regularly provided with meal breaks.  
 15 As such, he cannot state causes of action under California Labor Code Sections 510 and 1194, 29  
 16 U.S.C. Section 201 et. seq., California Labor Code Section 226.7, or California Labor Code Section  
 17 203. As there is no violation under any of the above sections, plaintiff's fifth cause of action under  
 18 California Business & Professions Code Section 17203 also fails.

19      **C. Plaintiff Has Not Stated a Cause of Action Because his Pay Stubs Showed He**  
 20      **Was Paid for Every Hour of Overtime.**

21      Finally, plaintiff argues that, if the extrinsic documents presented by defendants in their  
 22 motion to dismiss are excluded from consideration by the Court, then his complaint superficially  
 23 states a valid case for overtime and missed meal breaks. However, based upon the above-cited  
 24 authority, the Court *does* have power to consider the extrinsic documents when ruling on a motion  
 25 to dismiss. Indeed, it would be highly improper for a plaintiff to be permitted to proceed with a  
 26 complaint for a class action with allegations such as these, when documentary evidence clearly  
 27 contradicts those claims.

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1 Plaintiff should not be permitted to proceed with this complaint, and the motion to dismiss  
 2 should be granted.

3       **D. Plaintiff's Opposition was Filed Late.**

4       According to Local Rule 7-3(a), “[a]ny opposition to a motion must be served and filed not  
 5 less than 21 days before the hearing date.” The hearing date on this motion is February 22, 2008,  
 6 thus, plaintiff’s opposition was due 21 days before that, or by February 1, 2008. Plaintiff did not file  
 7 his opposition until February 2, 2008 – which was a Saturday, which means that defendants were  
 8 effectively denied three days to review and respond to the opposition, as they did not receive the  
 9 opposition until Monday, February 4<sup>th</sup>.

10      Under Local Rule 1-4, a “[f]ailure by counsel or a party to comply with any duly promulgated  
 11 local rule or any Federal Rule may be a ground for imposition of any authorized sanction.” It is well  
 12 documented that district courts have “inherent power to control their dockets.” (*Hamilton Copper*  
 13 & *Steel Corp. v. Primary Steel* (9th Cir. 1990) 898 F.2d 1428, 1429, *citing Thompson v. Housing*  
 14 *Authority of Los Angeles* (9th Cir. 1986) 782 F.2d 829, 831, cert. denied, 479 U.S. 829 (1986). “In  
 15 the exercise of that power they may impose sanctions where appropriate, including dismissal of a  
 16 case for failure to file a timely opposition. (*Thompson*, 782 F.2d at 831 (citations omitted).) Here,  
 17 the Court should disregard plaintiff’s opposition, because a late opposition is a tacit consent to the  
 18 motion.

19       **III. ALTERNATIVELY, DEFENDANTS SEEK SUMMARY JUDGMENT PURSUANT**  
 20       **TO F.R.C.P. RULE 56.**

21      Plaintiff has not seriously cast doubt on the authenticity of his time cards and pay stubs.  
 22 Rather, he has admitted that he signed the time cards, and has made no statement whatsoever as to  
 23 the pay stubs. The exhibits submitted by defendants self-evidently contradict plaintiff’s allegations,  
 24 and are not seriously in dispute. As such, if the Court does not proceed pursuant to Rule 12(b)(6),  
 25 this case should be resolved on summary judgment under Rules 12(d) and 56 of the Federal Rules  
 26 of Civil Procedure.

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#### **IV. CONCLUSION.**

For all the above reasons, defendants Nth Connect and Steven Chen respectfully requests that this court issue an order granting their motion under Rule 12(b)(6) and dismiss this action with prejudice, as plaintiff Balarezo cannot state any cause of action against defendants. In the alternative, defendants request that this court enter summary judgment in favor of defendants and against plaintiff on all causes of action pleaded in the complaint.

Dated: February 8, 2008

Friedman, Enriquez & Carlson, LLP

By: \_\_\_\_\_ /s/  
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